AN ARCHITECT OF RELIGIOUS LIBERTY DOCTRINES FOR THE ROBERTS COURT

GABRIELLE GIRGIS*

INTRODUCTION: A "PRACTICAL ORIGINALIST" ON THE RELIGION CLAUSES

Justice Alito's work on religion law is a hallmark of his jurisprudence. He has shaped this field more than any other sitting Justice, and perhaps even more than any other member of the Court in its history. On many issues—religious neutrality and religious exemptions, church autonomy, the Establishment Clause, and more—he has authored pioneering opinions that have refined existing doctrines. He has elaborated precedents to meet new challenges and then, when they have proven unworkable, replenished the caselaw by drawing on deeper sources—forgotten precedents, historical practice, and the text. In this way, Alito's religion opinions highlight his distinctive approach as a doctrinalist and practical originalist, combining discipline with vision.

His contributions began, remarkably, with his time as a circuit judge. When the Supreme Court in *Employment Division v. Smith*[1] declared that under the Free Exercise Clause, a law would trigger strict scrutiny—and potentially an exemption—only if the law failed to be neutral and generally applicable, the meaning of "neutrality" was far from clear. The most important answer came from then-Judge Alito, who defined and applied the concept in ways that would guide the Supreme Court's own cases for decades—

* Postdoctoral Fellow, Ethics & Public Policy Center. Ph.D., Princeton, 2020.

1. 494 U.S. 872 (1990).

including in its free exercise review of COVID-19 regulations some 30 years later.

Besides refining free exercise doctrine, Justice Alito has at times urged deeper changes. His concurrence for *Fulton v. City of Philadelphia*[2] presses the Court to overturn *Smith* entirely, and to restore the pre-*Smith* rule that even facially neutral and generally applicable laws ought to be reviewed under strict scrutiny when they substantially burden a person's religion.[3] At one level, of course, to overrule *Smith* would be a break with existing doctrine. But Alito's concurrence in *Fulton* took the position that overturning *Smith* would be a move toward greater coherence. His opinion painstakingly marched through history and caselaw to make the case that *Smith* rested on shaky foundations. *Smith* itself was poorly reasoned, its framework had proven unworkable, and later decisions had undermined its reach.[4] Under these circumstances, he argued, the integrity of free exercise law would best be served by reaching past *Smith* for deeper sources—text, history (including the Founding-era state protections for religion that provided the backdrop for the First Amendment), and pre-*Smith* precedents that for decades had afforded religion more surefooted protection.[5]

Justice Alito's comprehensive analysis in *Fulton* can only be fully appreciated in its broader context. Many of his earlier decisions offer guidance for how religious-liberty claims will likely fare in a post-*Smith* world. These include several opinions applying federal laws that sought to restore the pre-*Smith* rule in statutory form: *Burwell v. Hobby Lobby Stores*,[6] *Holt v. Hobbs*,[7] and *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.[8] These decisions highlight the key questions that lower courts, litigants, and scholars will

2. 141 S. Ct. 1868 (2021).
3. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).
4. *See Fulton*, 141 S. Ct. at 1892–99 (Alito, J., concurring in judgment).
5. *Id.* at 1898–1907.
6. 573 U.S. 682 (2014).
7. 574 U.S. 352 (2015).
8. 140 S. Ct. 2367 (2020).

have to grapple with in religious -liberty cases if, and when, the Court takes up Justice Alito's invitation in *Fulton.*

A similar theme of doctrinal sophistication and historical sensitivity animates Justice Alito's Establishment Clause opinions. When the Court began moving its caselaw, by fits and starts, away from the so-called *Lemon* test's multi-factor, theoretical analysis (turning on whether the law has a secular purpose, etc.),[9] and toward a more purely historical approach (based on whether a practice of recognizing religion is part of a longstanding tradition),[10] Alito's opinion for the Court in *American Legion v. American Humanist Association*[11] brought that development to near-completion. It did so to such an extent that by the next time the Court addressed the question in *Kennedy v. Bremerton*,[12] it could say that *American Legion* had effectively killed the *Lemon* test,[13] so that now all that controlled Establishment Clause analysis were text and history.[14]

In spelling *Lemon*'s demise, Alito's *American Legion* opinion was—like his call to overturn *Smith*—about both change and deeper continuity. Rather than dismiss *Lemon* casually, Justice Alito's opinion thoroughly studied the doctrine's operation over decades, found it irretrievably unworkable and eroded by more recent cases, and declared that doubling down on *Lemon* now would only create further confusion in the caselaw.[15] Thus, going beyond *Lemon* to first principles—to text and historical practice—was the best way to keep the law cogent.

Finally, when the Court in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*[16] embraced an important church -autonomy doctrine—the ministerial exception—Alito's doctrinal acumen again proved valuable. His concurrence in the case anticipated

9. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).
10. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783 (1983).
11. 139 S. Ct. 2067 (2019).
12. 142 S. Ct. 2407 (2022).
13. *See id.* at 2427 (citing *Am. Legion*, 139 S. Ct. at 2079–81 (plurality opinion)).
14. *See id.* at 2428.
15. *See Am. Legion* 139 S. Ct. at 2080–82.
16. 565 U.S. 171 (2012).

questions that would soon arise (about how to define a "minister") and provided a roadmap that would guide lower courts until it became controlling Supreme Court precedent, through a majority opinion by Alito himself, in *Our Lady of Guadalupe School v. Morrissey-Berru*.[17]

This recurring pattern—of working from within received doctrines but elaborating them and sometimes, in an effort to achieve more genuine coherence, moving beyond them—reflects his distinctive gifts and tendencies as a judge. He is faithful to caselaw but not in a wooden way; sensitive to its need for renewal and inclined to renew, as needed, based on text and history. In other words, here as elsewhere (as other Essays in this volume confirm), Alito balances attention to doctrine and original sources. And here even more than elsewhere, he has been the Court's leader.

I. TOWARD A NEW ERA OF FREE EXERCISE INTERPRETATION

Justice Alito's free exercise opinions have filled out the old and pointed toward the new. In a Third Circuit case called *Fraternal Order of Police v. City of Newark*[18], then-Judge Alito helped the Supreme Court to answer to a key question under *Smith*'s interpretation of the First Amendment: what it meant for a law to fail to be "neutral" toward religion (and thus warrant strict scrutiny). But as Justice he would eventually call for *Smith*'s reversal, to bring free exercise law more in line with the original meaning of the First Amendment. If *Smith* is overturned, the Court would be able to draw on some of Alito's opinions again, this time to articulate its new model for assessing exemption claims. It could draw, in particular, on his opinions applying the Religious Freedom Restoration Act[19] (RFRA) and the Religious Land Use and Institutionalized Persons Act[20]

17. 140 S. Ct. 2049 (2020).

18. 170 F.3d 359 (3d Cir. 1999).

19. 42 U.S.C. §§ 2000bb-1(a)–(b), 2000bb-2 (2018) (invalidated in part by City of Boerne v. Flores, 521 U.S. 507 (1997)).

20. 42 U.S.C. §§ 2000cc–2000cc-2 (2018).

(RLUIPA)—two federal laws through which Congress sought to restore the religious exemptions test scrapped by *Smith*.

As noted above, under the Court's guiding interpretation of the Free Exercise Clause in *Smith*, there is no constitutional entitlement to religious exemptions from (or even heightened scrutiny of) laws that are neutral and generally applicable. In other words, strict scrutiny applies only if, say, the challenged law targets religion or involves "a context that len[ds] itself to individualized governmental assessment of the reasons for the relevant conduct"[21] (like the denial of unemployment insurance to those refusing work for religious reasons, as in *Sherbert*). The Supreme Court's first occasion to apply this standard was fairly straightforward. In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[22] members of the Santeria religion in Florida argued that a local ordinance prohibiting animal slaughter violated their free exercise right to practice ritual animal killing. In a decision upholding that claim, the Court explained that the law, while facially neutral, was designed to target Santeria practice, because it banned animal-killing only when undertaken for religious reasons. Since exemptions to the no-slaughter rule were allowed if the killing was performed for secular reasons, the Court concluded, "religious practice [was] being singled out for discriminatory treatment."[23]

But what are other, less glaring ways to violate *Smith*'s insistence on neutrality and general applicability? And *must* the policy involve a system of individualized exemptions (like the unemployment insurance context of *Sherbert*, and the animal-slaughter ordinance in *Lukumi*), or are there other warning signs of non-neutrality? The first prominent answers—decisive for future cases—came from then-Circuit Judge Alito in *Fraternal Order of Police*. Sunni Muslim police officers in Newark, New Jersey, had been dismissed for refusing to shave their beards, in violation of the police department's grooming policy. But the policy made an

21. *See* Emp. Div. v. Smith, 494 U.S. 872, at 884 (1990).
22. 508 U.S. 520 (1993).
23. *Id.* at 538.

exception for those who refused to shave for medical reasons. The Muslim officers argued that the policy triggered strict scrutiny under *Smith* and *Lukumi*. Alito agreed with their argument that "since the Department provides medical—but not religious—exemptions from its 'no-beard' policy, it has unconstitutionally devalued their religious reasons for wearing beards by judging them to be of lesser import than medical reasons."[24] In particular, Alito explained, it did not matter whether the secular exemption was "individualized," as in *Sherbert* and *Lukumi*, because the Supreme Court's fundamental "concern" in *Lukumi* was simply "the prospect of the government's deciding that secular motivations are more important than religious motivations," and "this concern is only *further* implicated when the government does not merely create a mechanism for individualized exemptions [as in *Lukumi*], but instead, actually creates a categorical exemption for individuals with a secular objection but not for individuals with a religious objection [as in *Fraternal Order of Police*]."[25] Whatever the precise mechanism, it was the state's treatment of secular reasons for an exemption more favorably than religious reasons that was "suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*."[26]

Alito's opinion clarified a second and more important question. Does *just any* exemption for secular but not religiously motivated conduct trigger heightened scrutiny under *Smith*? Or must the exempted secular conduct be sufficiently analogous to the religious conduct? The very end of his opinion answered: Courts should apply strict scrutiny only when the exempted secular conduct would comparably undermine the state's interest in the rule at issue.[27] For example, in *Fraternal Order of Police*, the fact that the police department exempted undercover police officers (but not religiously motivated officers) from its no-beard policy was not enough to trigger

24. Fraternal Ord. of Police of Police Newark v. City of Newark, 170 F.3d 359, 365 (3d Cir. 1999).

25. *Id.* (emphasis added).

26. *Id*.

27. *See id.* at 366.

strict scrutiny—because letting undercover police officers grow a beard did not undermine the department's asserted interest in "fostering a uniform appearance" (since "undercover officers 'obviously are not held out to the public as law enforcement person[nel]'").[28] But strict scrutiny *was* triggered by exemptions for publicly identifiable officers who refused to shave for medical reasons, because their refusals *did* undermine the department's interest in uniformity just as much as religiously motivated refusals.

This account of when secular conduct is *comparable*—so that privileging it violates neutrality, and triggers strict scrutiny—has shaped the Supreme Court's reasoning in other free exercise cases, as recently as those challenging COVID-19 regulations. A common thread in these Court decisions is that governments may not impose more stringent rules on religious activity than on secular activities that pose a *comparable risk to public health*. In *Tandon v. Newsom*,[29] for example, religious believers were granted an injunction from the state's restrictions on private gatherings, which limited their ability to meet for worship in their own homes. In a *per curiam* opinion, the Court insisted that "government regulations are not neutral and generally applicable, and therefore trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[30] And crucially, echoing then-Judge Alito, it reiterated that "whether two activities are comparable . . . must be judged against the asserted government interest that justifies the regulation at issue."[31] With COVID restrictions, "[c]omparability is concerned with the risks various activities pose, not the reasons why people gather."[32] In *Tandon*, the problem was that "California treat[ed] some comparable secular activities more favorably than at-home religious exercise," by allowing facilities like "hair salons, retail stores, personal

28. *Id*.
29. 141 S. Ct. 1294 (2021).
30. *Id*. at 1296.
31. *Id*.
32. *Id*.

care services, movie theaters," and restaurants "to bring together more than three households at a time."[33]

This reading of the *Smith* test on neutrality reflects then-Judge Alito's best effort to clarify a higher court's precedent in light of the Free Exercise Clause. Yet as a Justice, Alito has explained why *Smith*'s standard is still insufficiently workable or protective of free exercise. His extended concurrence in *Fulton* arguing for *Smith* to be overruled on these grounds is worth considering closely. A chief problem with *Smith*, he argues, is its narrowness, which comes at the expense of religious freedom that should be protected under the First Amendment. As he points out early in the opinion, *Smith*'s reasoning has "startling consequences."[34] Under *Smith*, laws could be constitutional—consistent with free exercise—even if they prohibited alcohol consumption, for example, or slaughter of a conscious animal, or circumcision, without making exceptions for the celebration of the Catholic Mass, kosher and halal slaughter, or ritual circumcision in Judaism and Islam.[35]

The remainder of his concurrence argues that these consequences are not merely counterintuitive, but indeed unconstitutional, judging by the original meaning of the Free Exercise Clause, both on its face and in light of then-existing state constitutions (which provided a backdrop for the Clause's adoption).[36] Referring to dictionary definitions from the ratification period, Justice Alito argues that the "normal and ordinary meaning" of the First Amendment's bar on any law "prohibiting the free exercise of religion" would have encompassed laws "forbidding or hindering unrestrained religious practice or worship."[37] This plain meaning, he observes, didn't imply anything like *Smith*'s distinction "between laws that are generally applicable and laws that are targeted" against religion.[38] And

33. *Id.* at 1297.

34. Fulton v. City of Philadelphia, 141 S. Ct. at1868, 1883 (Alito, J., concurring in the judgement) (2021).

35. *Id.* at 1884.

36. *Id.* at 1894–1907.

37. *Id.* at 1896.

38. *Id.*

in the colonial charters and state constitutions that normally inform our reading of the Bill of Rights, he continues, the "predominant model" was to protect religious liberty except where "the public peace" or "safety" was at risk.[39] As Alito pointed out, such a "carve-out" would have been unnecessary if religious liberty only barred laws that were openly hostile to religious practice.[40] Just so, colonies' and states' practices reflected widespread support for religious accommodation, even from otherwise neutral laws (e.g., regarding the swearing of oaths, military service, and the payment of taxes to state-established churches).[41] Finally, Alito finds, historical scholarship defending *Smith*'s reading is "unconvincing" and "plainly insufficient to overcome the ordinary meaning of the text."[42] Early court cases are scant and conflicted, and the parts of the First Amendment's drafting history relied on by *Smith*'s supporters (e.g., the Founders' decision not to include a provision exempting conscientious objectors from military service) can be explained on grounds that do not lend support to *Smith*.[43]

Justice Alito bolsters his interpretation of the Free Exercise Clause, and drives home the weaknesses of *Smith*, when he considers factors relevant to overturning any precedent: its reasoning, its consistency with other precedents, its workability, and developments in doctrine since it has been handed down.[44] On all four counts, he compellingly argues, *Smith* should no longer stand. In rejecting a constitutional claim to exemptions from neutral laws, *Smith* decided an issue that was never briefed or argued.[45] It gave no attention to the original meaning or history of the First Amendment, and offered spurious or half-hearted grounds for distinguishing several longstanding precedents.[46] Its evident and almost

39. *Id.* at 1901.
40. *Id.* at 1903.
41. *See id.* at 1905–06.
42. *Id.* at 1907.
43. *Id.* at 1907–12.
44. *Id.* at 1912–24.
45. *Id.* at 1912.
46. *Id.* at 1912–15.

exclusive motivation was a concern that judicially recognized exemptions would be judicially unadministrable, but its own standard (requiring courts to determine if a law is non-neutral or non-generally applicable) had proven unwieldy to apply.[47] And it was squarely at odds with more recent decisions by the Court, which recognized or implied support for free exercise exemptions that *Smith* would never countenance.[48] Alito points, for example, to *Hosanna-Tabor*, where "the Court essentially held that the First Amendment entitled a religious school to a special exemption from the requirements of the Americans with Disabilities Act of 1990"; to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, which suggested that clergy members who cannot in good conscience officiate a same-sex wedding "would be entitled to a religious exemption from a state law" limiting "authority to perform a state-recognized marriage" to those "who are willing to officiate both opposite-sex and same-sex weddings"; and to *Boy Scouts of America v. Dale*, which "granted the Boy Scouts an exemption from an otherwise generally applicable state public accommodations law."[49]

While only two other Justices (Thomas and Gorsuch) joined Alito's *Fulton* opinion, another two (Barrett and Kavanaugh) expressed willingness to revisit *Smith* once it is clear what doctrines will replace it.[50] Alito therefore concludes his *Fulton* opinion by urging a return to the Court's standard for exemptions under *Sherbert*, which required the Court to apply strict scrutiny to any law that substantially burdened religion. In *Fulton* he does not say much more about the contours of that new regime, but we get a more detailed picture from other opinions in which he discusses the application of RFRA and RLUIPA—which, as noted, sought to restore *Sherbert*'s doctrine, albeit in statutory form. Put together, in fact, these opinions may help forge the Justice's legacy as an architect of the Court's religious liberty doctrines in the twenty-first century,

47. *Id.* at 1917–23.
48. *Id.* at 1915–16.
49. *Id*.
50. *See id.* at 1882–83 (Barrett, J., concurring).

by guiding strict scrutiny analysis in free exercise cases post-*Smith* (and the application of important religious liberty statutes even now). I will focus on the two core questions under *Sherbert*-like analysis: (1) whether a law has imposed a *substantial burden* on religion; and (2) whether application of the law to the religious claimant serves a *compelling state interest*.

Start with Justice Alito's understanding of substantial burden analysis, expressed clearly in his concurrence for *Little Sisters of the Poor* and his majority opinion in *Hobby Lobby*. In both cases, Christian employers had religious objections to providing insurance coverage of contraceptives (or just abortifacient ones, in *Hobby Lobby*), which the Obama administration had required of most large-scale employers.[51] The Little Sisters of the Poor, unlike the Green family, who owns Hobby Lobby, were not large-scale employers, but they objected to the accommodation for religious non-profits that the administration offered, believing that it would still make them complicit in the insurance coverage (just in a more roundabout way).[52] In his concurrence for the Little Sisters' case, Alito argued that "substantial burdens" on religion should be determined by two factors: (1) whether there are "substantial adverse practical consequences" for the religious person who refuses to comply with the law; and (2) whether adherence to the law will "cause the objecting party to violate its religious beliefs, *as it sincerely understands them*."[53] What courts should not do is second-guess the truth or reasonableness of the claimants' beliefs on a "difficult and important question of religion and moral philosophy," as he put it in *Hobby Lobby*: namely, when "it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of an immoral act by another."[54] "Arrogating the authority to

51. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 140 S. Ct. 2367, 2373–75 (2020).

52. *Id.* at 2376.

53. *Id.* at 2389 (Alito, J., concurring).

54. Burwell v. Hobby Lobby Stores, 573 U.S. 682, 724 (2014).

provide a binding national answer to this religious or philosophical question" is simply off-limits to courts.[55]

Under RFRA as under *Sherbert*, once the Court has established that a law substantially burdens religion, it must apply strict scrutiny, which asks whether application of the law to the religious person is the most narrowly tailored, or least restrictive, means of serving a compelling state interest. On how to determine whether a claimed interest is compelling, Justice Alito has suggested first that the interest must fall within a narrow range of exceptionally weighty public goods (and his historical analysis of free exercise in *Fulton* may shed more light on this point). Second, reluctant to have courts impose their own view of how important an interest is, he has urged basing the "compellingness" inquiry on whether the jurisdiction in question really treats the interest as compelling, and whether other jurisdictions do. Third, he has stressed that under RFRA (and the same point may also apply under any Free Exercise Clause cases that could arise post-*Smith*), there must be a compelling interest specifically in the law's application to a *particular religious claimant* (over her objections to compliance).

A discussion of the first requirement comes in Justice Alito's opinions for *Little Sisters of the Poor* and *Fulton*. In *Little Sisters*, he reminds us of *Sherbert*'s insistence that "'[o]nly the gravest abuses, endangering paramount interest'" could "'give occasion for [a] permissible limitation'" on free exercise.[56] *Fulton* could be read as clarifying what it takes to justify a burden on religious liberty in particular. As noted above, Alito suggests there that in the Founding era, under colonial and state-constitutional protections for religious liberty, the only interests deemed compelling enough to justify limits on free exercise were those of "public peace and safety."[57] And this was understood narrowly, he continues: it was not thought, as

55. *Id*.

56. *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring).

57. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1902 (2021) (Alito, J., concurring in the judgment) ("[M]ore than half of the State Constitutions contained free-exercise provisions subject to a 'peace and safety' carveout or something similar.").

defenders of *Smith* have argued, that every form of conduct regulated by generally applicable laws is "necessary" to secure those conditions.[58] Rather, he points out, dictionary usage from the time suggests that the terms "peace" and "safety" were closely tied to relief from violence and war or threat of physical harm. And Blackstone's list of "offenses against the public peace," in contrast to his "catalog[ging]" of many offenses that "do not threaten" violence or physical harm (such as "cursing," refusing to pay taxes for infrastructural repairs, or acting as a "common scold"), centered on behaviors that were either violent or incendiary, such as rioting, "unlawful hunting," carrying "dangerous or unusual weapons," and so on.[59] In short, a sound interpretation of the original meaning of the Free Exercise Clause would suggest that only the most foundational interests of any government—those of securing basic conditions necessary for public order and freedom from violence—can justify laws that restrict religious exercise without offering an exemption.

Second, in *Little Sisters of the Poor*, Justice Alito suggests that rather than judge compellingness for themselves, courts could examine whether the state issuing the rule in question really treats the interest as compelling:

> If we were required to exercise our own judgment on the question whether the Government has an obligation to provide free contraceptives to all women, we would have to take sides in the great national debate about whether the Government should provide free and comprehensive medical care for all. Entering that policy debate would be inconsistent with our proper role, and RFRA does not call on us to express a view on that issue. We can answer the compelling interest question simply by asking whether *Congress* has treated the provision of free contraceptives to all women as a compelling interest.[60]

58. *Id*. at 1904.
59. *Id*. at 1903–04.
60. *Little Sisters*, 140 S. Ct. at 2392 (Alito, J., concurring).

Along these lines, the Court found in *Little Sisters* that the federal government had failed to treat women's interest in free contraception as compelling. This was clear from the numerous exemptions (for very small businesses, or companies with "grandfathered" insurance plans), as well as the government's "fail[ure] to ensure that millions of women have access to free contraceptives" (by leaving out coverage, for example, of women "who do not work outside the home").[61]

Alito has also suggested that courts look to the practices of *other* jurisdictions. In *Holt v. Hobbs*, which applied RLUIPA to vindicate a Muslim prisoner's right to grow a beard, Alito's opinion for the Court noted that "the vast majority of States and the Federal Government permit inmates to grow half-inch beards," while the state at issue there—Arkansas—did not.[62] This, he suggested, increased Arkansas's burden to establish that the interest in barring a half-inch beard is compelling: "[W]hen so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course."[63]

Third, Justice Alito has stressed that the compelling interest inquiry must focus on the right unit of analysis. Under RFRA and RLUIPA, courts should ask whether the compelling interest requires applying the regulation to *a particular claimant*. Alito emphasizes this point both in *Hobby Lobby* and *Holt*. As he writes in *Holt* (citing *Hobby Lobby*),

> RLUIPA, like RFRA, contemplates a "more focused" inquiry and "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened.". . . RLUIPA requires us to "scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants" and "to look to the marginal

61. *Id.* at 2392–93.
62. Holt v. Hobbs, 574 U.S. at 352, 368 (2015).
63. *Id.* at 369.

> interest in enforcing" the challenged government action in that particular context.[64]

In sum, Justice Alito's opinions in cases involving RFRA and RLUIPA claims offer several bright line rules for strict scrutiny analysis of religious freedom claims under federal statutory law. If the Court decides to restore in constitutional law something like these policies' religious liberty protections (modeled after *Sherbert*, and requiring strict scrutiny wherever religion has been substantially burdened), its new interpretation of the Free Exercise Clause could be guided by these criteria.

II. ADVANCING THE "HISTORY AND TRADITION" METHOD OF ESTABLISHMENT CLAUSE INTERPRETATION

In Establishment Clause jurisprudence, Justice Alito's contributions run parallel to those discussed above. Just as he applied (and helped spell out the meaning of) *Smith* while treating *Smith*'s shortcomings as an impetus for proposing a better approach, so too he has worked with (and better specified) the Establishment Clause doctrine created in *Lemon v. Kurtzman* (and later cases using the "*Lemon* test") while pushing the Court beyond *Lemon*'s pitfalls toward a more originalist approach.

In *Lemon*, the Court proposed that state action is an unlawful establishment of religion if it (a) lacks a secular purpose; (b) has the primary effect of advancing or inhibiting religion; or (c) fosters excessive entanglement between religion and government.[65] A later accretion was the "endorsement test," which in Justice O'Connor's telling asked whether a "reasonable observer" would think that the "challenged governmental practice conveys a message of endorsement of religion."[66]

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64. *Id.* at 362–63 (internal citations omitted).

65. Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

66. Allegheny Cnty. v. ACLU, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

Echoing O'Connor, Justice Alito has emphasized that applications of this test should consider *all* relevant information available to the observer, including facts not immediately apparent, for example, to someone simply looking at a religious display. In his concurrence for *Salazar v. Buono*,[67] a case involving an Establishment Clause challenge to a World War I memorial cross on federal land in the Mojave Desert, Justice Alito urged that a reasonable observer would "be aware of the history and all other pertinent facts relating to a challenged display"—including, in that case, the fact that Congress had decided to transfer ownership of the land on which the cross stood to a private party, in exchange for another piece of land without the cross.[68] That transfer should be seen by the reasonable observer not as "an endorsement of Christianity" (as Justice Stevens argued in his dissent), but rather as a good "effort by Congress to address a unique situation and to find a solution that best accommodates conflicting concerns" about the memorial.[69]

In more recent establishment cases, the Court was asked to reverse *Lemon*. Justice Alito's opinion for the majority in *American Legion*, a case that considered another World War I memorial cross, this time on public land in Maryland, is not unlike his concurrence in *Fulton* repudiating *Smith*'s interpretation of the Free Exercise Clause. For it highlights the shortcomings of the Court's guiding precedent in *Lemon* and illustrates how an alternative approach reflected in more recent cases—here, a test focused on history and tradition—would resolve the issue at hand. Alito first points out the *Lemon* test's inconsistency with longstanding (and long-accepted) practices in our nation's history, including public references to God in various official contexts.[70] Next he cites many Justices, judges, and scholars who have lamented how unpredictable, indeterminate, and internally inconsistent the *Lemon* test's outcomes have

67. 559 U.S. 700 (2010).
68. *Id.* at 728 (Alito, J., concurring).
69. *Id*.
70. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019).

been.[71] Third, he focuses on problems peculiar to applying *Lemon* to public displays like the one at issue in *American Legion*—for example, the challenge of discerning the "purpose" of any longstanding display (under the first prong of the *Lemon* test), due to the age of the display and the evolution of its purpose over time to include new secular, historical, or cultural meanings.[72]

For these reasons, Alito declines to adhere to *Lemon*'s "grand unified theory of the Establishment Clause," opting instead for the "more modest approach" of the Court's more recent cases, which is rooted in the "particular issue at hand and looks to history for guidance." In this vein, surveying official expressions of religiosity—in particular, legislative prayers—that were upheld in recent Supreme Court cases and date all the way back to the First Congress, Alito notes that these practices reflected "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans." In light of the long tradition of public religious expression that shares those features—and given the difficulty of applying *Lemon* (and in particular its "purpose" inquiry) to longstanding religious displays—Alito concludes that "[w]here categories of monuments, symbols, and practices with a longstanding history follow in that tradition [of tolerance and inclusivity], they are likewise constitutional."[73]

Ultimately, *American Legion* stops short of expressly declaring *Lemon* dead for all purposes. Yet its aspersions on *Lemon*, its embrace of history and tradition as superior criteria, and its reasons for favoring that approach in religious-display cases were so forcefully stated that the Court's next major case addressing Establishment Clause issues endorsed several lower court judges' reading that *American Legion* had signaled the complete demise of *Lemon*.[74] Thus, in the Establishment Clause setting (with respect to *Lemon*),

71. *Id*. at 2081.
72. *Id*. at 2081–85.
73. *Id*. at 2089.
74. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2421, 2427 (2022).

as in the free exercise setting (with respect to *Smith*), Alito has shown himself capable of developing doctrine, bringing to a head its internal tensions, and drawing on history and tradition to point the way to a sounder replacement doctrine.

One further analogy to Justice Alito's thought on free exercise is worth noting: an acute sensitivity to the privileging of secular over religious reasons for various actions. As noted above, Alito has recognized that a law cannot be "neutral" toward religion if it exempts conduct chosen for secular reasons, but not comparable conduct chosen for religious reasons. That is because, however well-meaning, this disparity of legal treatment reflects an arbitrary devaluing of religious reasons. Along similar lines, Alito has emphasized in establishment cases that just as the imposition of exclusionary religious displays can signal favoritism toward a religion, so the *removal* of longstanding religious displays can signal "aggressive[] *host[ility]* to religion."[75] This is true no matter how well-meaning the removal may be—in other words, even if the goal is to avoid excluding non-Christian observers, as Justices Ginsburg and Sotomayor suggested in their dissent in *American Legion*.[76]

III. ROBUST PROTECTION FOR INSTITUTIONAL RELIGIOUS FREEDOM

During Justice Alito's tenure, the Court has heard several cases involving a First Amendment doctrine that protects the freedom of religious institutions to govern themselves. Under the so-called "ministerial exception," a religious entity's decisions regarding the hiring and firing of its ministers are exempt from the reach of employment-antidiscrimination laws. Justice Alito has clarified the scope of this exception in his concurrence in *Hosanna-Tabor* and his majority opinion in *Our Lady of Guadalupe School*, both of which tie the meaning of a "minister" to an employee's function or purpose within a religious institution. His clarifications have broadened the

75. *Am. Legion*, 139 S. Ct. at 2085.

76. *Id.* at 2107–08 (Ginsburg, J., dissenting).

principle's reach, to the benefit of more religious associations and especially those of less mainstream faiths.

Hosanna-Tabor involved a Lutheran school's firing of one of its teachers, Cheryl Perich, who then sued under the Americans with Disabilities Act, claiming that she had been unjustly terminated for a newly diagnosed disability.[77] The school maintained that it had dismissed Perich on religious grounds, for her refusal to settle their disagreement over her employment outside the courts (which runs counter to Lutherans' outlook on conflict resolution). A unanimous Court held that antidiscrimination laws could not be applied to regulate the school's choice of teachers, who were "ministers" in the relevant sense. But the majority opinion avoided deeper elaboration of what it takes to count as a minister under this doctrine, content to focus on a few key facts in the case at hand, including the teacher's formal title and formal commissioning as a minister.[78]

Justice Alito's concurrence, joined by Justice Kagan, argues that the title of "minister" should be defined by an employee's function, rather than other characteristics that could be interpreted too narrowly, to the exclusion of religious minorities. "Because virtually every religion in the world is represented in the population of the United States," he writes, "it would be a mistake if the term 'minister' or the concept of ordination were viewed as central to the important issue of religious autonomy that is presented in cases like this one. Instead, courts should focus on the function performed by persons who work for religious bodies."[79] Several roles—such as leadership, worship, or teaching—could ground ministerial status: "The 'ministerial' exception should . . . apply to any 'employee' who leads a religious organization, conducts worship services or

77. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC, 565 U.S. 171, 178–79 (2012).

78. *Id.* at 190 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister. It is enough for us to conclude, in this our first case involving the ministerial exception, that the exception covers Perich, given all the circumstances of her employment.").

79. *Id.* at 198 (Alito, J., concurring).

important religious ceremonies or rituals, or serves as a messenger or teacher of its faith."[80]

Writing for the Court, Justice Alito spells out this interpretation further in *Our Lady of Guadalupe School*, which upheld the dismissal of two Catholic school teachers under the same doctrine. In that opinion, he again cautions against using too rigidly the criteria that had defined Cheryl Perich as a minister in *Hosanna-Tabor* (her title, her training, her self-presentation as a minister, and her educational role in conveying Lutheran beliefs to students). None of these features, Alito emphasizes, should be deemed "essential" to a ministerial position eligible for the exemption (as the court below had erroneously held). The scope of the ministerial role is tied to "what an employee does," and clearly includes jobs focused on "educating young people in their faith, inculcating its teachings, and training them to live their faith"—all tasks that, in Alito's telling, "lie at the very core of the mission of a private religious school."[81] These distinctions have helped the Court articulate a broad vision of religious freedom that protects not only individuals but associations that are religiously affiliated or driven.

CONCLUSION: JUSTICE ALITO'S LEGACY IN RELIGION JURISPRUDENCE

The guiding principles of Justice Alito's religion jurisprudence might best be summarized as flexibility in the law's accommodation of religion (*Fulton*), respect for religious pluralism and tradition (*American Legion*), and deference to institutional autonomy (*Our Lady of Guadalupe School*). His jurisprudential approach in turn mirrors these principles, balancing fidelity to the past with resourcefulness and openness to change or renewal, for the sake of religion law's integrity. Future justices would do well to imitate his example in meeting legal challenges to religious liberty.

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80. *Id.* at 199.

81. Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2063–64 (2020).